

**Elite Limousine Plus, Inc. and Limousine Drivers' Union, Petitioner.** Case 29-RC-8637

November 6, 1997

**DECISION ON REVIEW AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS FOX  
AND HIGGINS

On December 3, 1996, the National Labor Relations Board granted the Employer's Request for Review of the Regional Director's Decision and Direction of Election (pertinent portions of which are attached) solely with regard to his finding that the Employer's drivers are employees within the meaning of Section 2(3) of the Act, and not independent contractors. After carefully reviewing the record, Petitioner's brief on review, and the brief amicus curiae filed by the American Federation of Labor and Congress of Industrial Organizations, the Board has decided to affirm the Regional Director's Decision.

In addition to the reasons stated in the Regional Director's Decision, we also rely on documentary evidence contained in Joint Exhibit 1: (1) a list of Elite franchises and franchisees as of October 31, 1995; (2) lists showing Elite franchisees who "purchased" franchises, "leased" franchises, and "canceled, terminated and voluntarily or involuntarily ceased to do business," from November 1, 1992, to October 31, 1995; and (3) a list showing Elite franchises which were repurchased by the Employer from November 1, 1992, to October 31, 1995. An analysis of this documentary evidence indicates that there is only a limited amount of entrepreneurial activity by franchisees.

We note first that most franchises are leased, not owned. In addition, although Shafquat Chaudhary, the Employer's president and CEO, testified in conclusory terms that most franchises that are owned are sold from a franchisee to another individual "these days," the documentary evidence is to the contrary. The above-described evidence establishes that most transactions involving franchises that are "owned" by franchisees are not between franchisees and another individual. Rather, most "owned" franchises are either repurchased by the Employer or otherwise are reacquired by the Employer because the franchise was canceled or terminated or the franchise has "voluntarily or involuntarily ceased to do business." Franchises reacquired by the Employer usually are not resold by the Employer; most are leased and many are not reissued. The Employer also limits, if not discourages, entrepreneurial activity by a clause in the franchise agreement which precludes the Employer's repurchase of a franchise if sold to a third party. We conclude from this evidence that the Employer retains control over most of the franchises it issues and that the level of entrepreneurial activity is insubstantial. Accordingly,

on the basis of this evidence, together with the other extensive uncontroverted evidence set forth in the attached Regional Director's decision regarding the Employer's right to control the limousine drivers, we conclude that the Regional Director's decision that the drivers are employees within the meaning of Section 2(3) must be affirmed.

**ORDER**

The Regional Director's Decision and Direction of Election is affirmed.

**DECISION AND DIRECTION OF ELECTION**

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The Petitioner seeks to represent all full-time and regular part-time drivers employed by the Employer at its Long Island City location, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act. The Employer contends that there are 512 individuals who drive vehicles for the Employer but whom the Employer considers independent contractors because they are franchise owners. The Petitioner argues that these drivers are employees within the meaning of Section 2(3) of the Act.

In support of its position the Employer relies on the testimony of its President and Chief Executive Officer Chaudhary. The Employer also called two drivers Dawood Emanuel and Mushtaq Ali to testify.

Although the company name characterizes the Employer's business as a limousine service, in reality the Employer uses dark colored Lincoln Town cars or Cadillacs for transportation of its customers. Currently, the Employer has about 3000 accounts. The Employer commenced operations in 1986 and has its headquarters in Long Island City where it occupies a four story building. The Employer employs about 90 employees in this building. The first floor is rented to a taxi insurance broker called Triborough Brokerage, Inc. (Triborough). Chaudhary, the Employer president and chief executive officer, is also the president of Triborough, a company that buys, sells, finances, and insures taxi cabs and for-hire vehicles, such as those driven by the Employer's drivers. Although Triborough is not involved in the lease or sale of luxury cars driven by the Employer's drivers, some of the Employer's drivers are insured by Triborough. The exact number of drivers insured by Triborough is unknown, but Chaudhary testified that the drivers are not required to use Triborough as their insurance company.<sup>7</sup>

The second floor of the Long Island City location houses the Employer's executive offices including the sales/marketing departments and secretarial staff. The third floor houses the data entry, billing, management information systems, and franchise liaison departments. The fourth floor houses the Employer's dispatch room. There is also a basement where

<sup>7</sup> According to Chaudhary Triborough has between 900 to 1000 clients and sells insurance to anybody, including the Employer's franchisees. Triborough also brokers the buying and selling of taxi medallions and arranges the financing and closing with the Taxi and Limousine Commission herein called the TLC. Chaudhary is also the president of City Lease, Inc., a taxi medallion lease management company.

the drivers drop off their vouchers and pick up their paychecks as discussed more fully below.

With regard to the Employer's organization Chaudhary has occupied the position of president and chief executive officer of the company since its inception. The Employer's board of directors includes Chaudhary, Chand Dham, and Stanley Epstein. Chaudhary owns 42 percent of the stock, Dham owns 42 percent, and Epstein owns 7.5 percent; the remaining stock is held by some of the Employer's employees. Epstein, Mian Siddique, and Dham are vice presidents and report directly to Chaudhary.<sup>8</sup> Epstein is in charge of customer relations; Siddique oversees the information systems department, which encompasses the dispatcher services unit and communications and management information systems;<sup>9</sup> and Dham is the franchise liaison officer who interviews prospective franchisees and ensures compliance with operating standards. Dham also manages the quality assurance department and dispatch services.<sup>10</sup> Michael Jaffee is the Employer's general manager and he oversees the Employer's daily operations and administrative functions, including the bookkeeping and data entry departments. He reports directly to Chaudhary.<sup>11</sup> Joan Boudreault is the executive administrator and reports directly to Chaudhary.<sup>12</sup> David Henken is the manager of the sales/marketing and customer service department and reports directly to Chaudhary. There are two receptionists and an unidentified number of clerical staff scattered throughout the above noted departments. The Employer provides medical insurance, paid vacations, and retirement plans to all of its employees working in the above-noted departments.

The Employer has a base license which is required by the TLC for the dispatch of for-hire vehicles.<sup>13</sup> The Employer has two radio stations, one with three channels and the other with two channels, which are licensed by the Federal Communications Center (the FCC). Since 1988, the Employer has been registered with New York State's Attorney General's office as a franchiser.<sup>14</sup> A franchise can be purchased or it can be leased. Either way, a franchisee must sign a franchise agreement with the Employer.<sup>15</sup> All franchise agreements are identical and copies of each one must be filed with the New York State Attorney General's office. There is no requirement that franchisees form companies although, according to Chaudhary, some do. Each franchise agreement states that

the parties thereto "mutually agree that it is the intent of this agreement to create a relationship of dispatcher and subscriber . . . and not one of employer-employee."

A franchise can be purchased from the Employer for \$35,000 and can be financed by a lending institution, the Employer, or a combination of both. After a minimum down payment of \$1000 the Employer will finance the remaining balance at the rate of 15 percent per annum for a period of 7 years, payable weekly. In practice, about 95 percent of franchises sold by the Employer directly to the franchisee is financed by the Employer.<sup>16</sup> However, according to Chaudhary, most franchises are sold from the franchisee to another individual. Should a franchisee wish to sell his franchise, he can set his own selling price without the Employer's approval, although the franchisee must notify the Employer of the name and address of the purchaser as well as the purchase price. The Employer can buy back the franchise, but if it chooses not to do so, it interviews and approves the prospective purchaser. A purchased franchise may be transferred or assigned to another individual. However, a transferred or assigned franchise cannot be sold back to the Employer.

A franchise can also be leased for \$100 per week in addition to a \$250 installation fee. The lessee is also required to pay the Employer a \$1000 franchise deposit to be retained by the Employer without interest. This deposit is built up to the sum of \$3000 over the period of 1 year by deducting equal weekly installments from the leased franchise earnings. A leased franchise cannot be transferred or sold. Upon 1-week notice, without providing any reason, the lessee may terminate the lease for a termination fee of \$250.

The franchise agreement contains no limit on duration, thus, it is valid until the Employer or franchisee terminates, transfers or sells the franchise. According to the franchise agreement, the Employer may terminate the agreement if there is a material breach of the agreement or the Employer handbook, which is described more fully below. When a franchise agreement is terminated, even on the part of the Employer, the leased franchise must pay the \$250 termination fee and all other franchises pay a \$1000 termination fee. Chaudhary testified that the Employer has the power to terminate a purchased or leased franchise and it has done so on occasion. When the Employer terminates a franchise owner's agreement, the franchisee can sell or transfer the franchise to another individual who meets the Employer's approval. That individual will not meet the Employer's approval if he has too many DWI violations, is under age, can not get insurance, or is not familiar with the geographical area.

Currently, there are 512 individuals who drive vehicles for the Employer whom the Employer contends are franchisees and independent contractors. Most of the franchisees, whether they are purchasers or lessees, are also the drivers of the vehicle. Based on the record evidence it appears that there are three franchise owners who do not drive their vehicles. Instead, they employ their own drivers. There are another three franchise owners who drive their own vehicles but also

<sup>8</sup>Siddique began his association with the Employer as a franchisee and advanced to his current position. See Jt. Exh. 1, p. 2.

<sup>9</sup>According to Chaudhary, there are six computer programmers in the management information systems department.

<sup>10</sup>Phillip George and Magel Kamel are supervisors in the quality assurance department. However, Chaudhary testified that they are also franchise owners. There was much testimony concerning the quality assurance and dispatch departments as they relate to the petitioned-for drivers. Accordingly, these departments are discussed more fully below.

<sup>11</sup>According to Chaudhary, there are 10 to 12 data entry clerks in the data entry and bookkeeping department, and 3 supervisors: Epstein, Vickie (last name unknown), and Marcella Villela-Balza.

<sup>12</sup>There are three employees in the customer service and sales departments Henken also works as a salesman.

<sup>13</sup>Employer Exhs. 9a and b.

<sup>14</sup>In April 1996, the Attorney General's office accepted the Employer's amended franchise prospectus under the same terms and conditions as those contained in the letter accepting the Employer's original prospectus. See Emp. Exh. 4.

<sup>15</sup>Jt. Exh. 1.

<sup>16</sup>It is unclear from the record whether the Employer finances the entire purchase price or only a part of it.

hire other individuals who drive on their behalf.<sup>17</sup> In addition to those described above, the Employer has two supervisors, Phillip George and Magel Kamel, who are franchise owners and employ drivers. Thus, there are a total of eight franchise owners who employ other individuals to drive their vehicles. The parties stipulated that the franchisees who employ drivers are Section 2(11) supervisors and thus should not be included in the unit. The Petitioner contends that the drivers working for these franchisees enjoy a community of interest with the petitioned-for unit employees. Alternatively, the Petitioner argues that these drivers are jointly employed by the Employer and the franchisee.

The parties stipulated that for tax purposes all franchisees file with the IRS a Schedule C Profit or Loss statement and a Schedule SE Self-Employment statement.<sup>18</sup> The parties also stipulated that all franchisees are issued a IRS 1099 form, not a W-2 form. The Employer does not withhold New York city or state income tax, nor does it withhold Federal income tax or FICA for the franchisees. The parties stipulated that unemployment insurance is not deducted from the franchisees' checks. Although the Employer does not provide disability or workers' compensation for the franchisees, Chaudhary testified that sometimes the Employer has been held to pay workman's compensation for franchise owners. Chaudhary did not elaborate on the specifics of these incidents. There was also record evidence that the New York State Department of Labor denied the unemployment claim of a franchise owner. In its letter denying the claim, the Department of Labor indicated that the franchisee sold his franchise rights, chose his work hours, could accept or refuse assignments, was not required to work solely for the Employer, and paid for his training.<sup>19</sup> With regard to other benefits, the Employer established the Elite Benefit Fund which is a death benefits fund for the franchisees and their dependents. According to Chaudhary, the fund was set up by mutual agreement of the franchisees and the Employer when a number of drivers were killed. The Employer contributes to the fund on a monthly basis, although the amount contributed varies depending on business volume and profitability. The contributed amount is at the Employer's discretion. General Manager Jaffee maintains the balance and interest payments of the fund.<sup>20</sup>

In order to become a franchisee and/or driver, one must have the following: a valid New York State class E driver's license; a valid New York city TLC limousine operator's license; a TLC for-hire vehicle permit; a safe driving record; a thorough geographical knowledge of the tristate New York city metropolitan area;<sup>21</sup> a reasonable command of English; experience as a driver; a courteous and polite manner; and familiarity with the Employer's billing policies, procedures, and handbook.<sup>22</sup> All insurance documents, registration, and

TLC permits are in the driver's name. Although the Employer's franchise handbook and franchise agreement both indicate that each franchisee must pay the Employer \$500 to attend a mandatory franchise training program, Chaudhary testified that this training is not required.<sup>23</sup> According to Chaudhary, it is only a suggestion and there are "many" who do not go through the training. However, the Employer does provide a geographical training class, given by Dham, George or Lloyd Dey, to learn about the Employer's zoning system.

When a driver commences work for the Employer, Dham assigns a grade to each driver based on his qualifications. The drivers can improve their grade level by asking the Employer to upgrade them. These decisions are made by Dham. Level A drivers have a great amount of experience and must be appointed by Chaudhary; level B drivers have at least 2 years' experience with the Employer and have no operating infractions or customer complaints during the preceding 18 months; level C drivers have at least 1-year experience with the Employer with no operating infractions or customer complaints during the preceding year; level D drivers have at least 6 months' experience; and, level E drivers must complete the Employer's geographical training class. The drivers grade level determines the jobs that are assigned to them, i.e., special jobs and out-of-town requests only go to level A or B drivers. A driver can be downgraded if he violates certain Employer rules or receives too many customer complaints as described more fully below.

The Employer has a 1-year probationary period in order to ensure that the driver is a safe driver and that there are no customer complaints filed against him. Chaudhary testified that if the Employer receives excessive complaints concerning a driver during the probationary period, he will terminate the franchise agreement. Decisions regarding passing the probationary period are made by Chaudhary, Jaffee, or Dham.<sup>24</sup>

All franchisee drivers, whether lessees or purchasers, are required to own a late model Lincoln Town Car or Cadillac, which they can utilize for their personal use. Either Chaudhary or General Manager Jaffee approves a vehicle for service. According to Chaudhary, the car service industry uses these cars because they have been proven to be safe and comfortable for customers. Chaudhary testified that the Employer finances the cars of one fourth to one third drivers. If the vehicle is financed by the Employer, the Employer requires fire, theft, and collision insurance. The Employer deducts said insurance money from the drivers' checks and the insurance money is forwarded to Lincoln Leasing Corp., a company that Chaudhary controls. The vehicles may not have tinted windows, but they must have reading lights in the back and antennas in the back of the car for cellular phone use. The rugs must be shampooed every 3 weeks, the windows cleaned once a week, and the ash trays dumped twice per shift. The driver buys his own maps and pays for his own insurance, car repairs, permit fees, and licenses. If a driver owes money to an outside vendor, i.e., a repair shop, or to another franchisee, the Employer deducts the moneys

<sup>17</sup> Emp. Exh. 1.

<sup>18</sup> Jt. Exh. 2.

<sup>19</sup> Emp. Exh. 5.

<sup>20</sup> See Jt. Exh. 3, p. 75 for details regarding these benefits.

<sup>21</sup> According to Chaudhary, a new driver is tested about his geographical knowledge of the metropolitan area. Phillip George does the testing; sometimes it is an oral test and sometimes it is written. If the driver does not pass the test he can retake the test.

<sup>22</sup> See Jt. Exh. 3, p. 8. With regard to the TLC operator and vehicle licenses, the TLC requires that the for-hire base operator, the Employer herein, sponsor the driver and sign an affidavit stating that

the driver will be dispatched from the Employer's base. See Emp. Exh. 11, form C, and Emp. Exh. 13.

<sup>23</sup> See Jt. Exh. 1, at sec. 11, 2.3 of the franchise agreement and Jt. Exh. 3, sec. 5.1.

<sup>24</sup> See Jt. Exh. 1, at sec. 11, 2.1 of the franchise agreement.

from the driver's paycheck and forwards the money to the vendor.<sup>25</sup>

Each vehicle must contain a mobile data terminal (MDT), which is a computer system used to communicate between the Employer's dispatch office and the drivers. In addition to the MDT, each car must have a radio for voice dispatching as well as a credit card imprint machine. The aforementioned items are on loan to the driver for which he pays a \$50 weekly service fee. Even if a driver does not work for a week he is still required to pay the weekly service fee. Everyday maintenance on these items is the Employer's responsibility. However, if the MDT or radio is lost, damaged, vandalized, or stolen, the driver bears the replacement cost. The Employer also provides a magnetic sign bearing the Employer's name which the driver is to display on the front window and back window while on Employer business. The sign is provided free of charge. If the sign becomes soiled the Employer provides a new one for free. If the sign is lost or stolen, the driver must pay for a new one.

The Employer contends that the franchise drivers are not required to work solely for the Employer. In this regard, Chaudhary testified that he did not know how many drivers work for other companies, although he heard a rumor that one car has a second radio indicating that the driver works for another company. Although Chaudhary contends that some drivers transport their own private customers and that the drivers are free to charge what they want in these circumstances, Chaudhary was not able to identify the percentage of drivers who have private customers. Despite the foregoing, the TLC rules state that a driver shall not solicit or pick up passengers by means other than prearrangement through an existing base nor shall a driver pick up a passenger at an authorized taxi stand.<sup>26</sup>

As indicated above, the Employer has a dispatch department which is primarily responsible for taking customer calls and dispatching them to the drivers on the road. The Employer's dispatch department is comprised of call-takers who answer phone calls from customers and record the following information into the dispatch computer: the name of the customer, method of payment, charge account number, and the time and location of pick up. There are three shifts in the dispatch department. The day shift, from 8 a.m. to 4 p.m., has about nine call-takers, one dispatcher, and 1 supervisor, Mohammad. The evening shift, 4 p.m. to midnight, has 14 to 17 call-takers, 2 dispatchers, and 1 supervisor, Dham. The midnight shift, 12 midnight to 8 a.m., has 4 call-takers, 1 dispatcher and a supervisor, Mr. Khan. The Employer dispatches about 2500 calls a day.

The Employer's drivers work in New York City's five boroughs, Nassau and Suffolk counties on Long Island, Westchester, Connecticut, and New Jersey. These areas have been divided into dispatch zones. Each zone is about 18 to 20 blocks which is about 1 mile. There can be various prices within 1 dispatch zone. According to Chaudhary, these zones are standard in the industry although the Employer has refined them somewhat. When a call-taker enters the cus-

tomers' address into the computer, the computer automatically identifies the zone number.

The TLC requires that the Employer publish and file with it a rate book. The rate book maps out the zones in each of the five New York boroughs as well as Long Island, Westchester, Connecticut, and New Jersey and contains flat rate schedules, airport rates, and the rate from Manhattan to every city and town in the States of New York, Connecticut, and New Jersey. Chaudhary testified that he constructed the flat rate schedule based on mileage and on industry standard. There is also a detailed explanation concerning the extra fees charged by the Employer for waiting for a customer, for additional stops on and off the route, and for the use of the vehicle's telephone. The rate book and the franchise handbook also explain the special rates associated with airport pick ups, i.e., parking the vehicle to wait for a customer or waiting at the gate. Chaudhary testified that the Employer has fixed rates, because its customers expect uniformity and it is not practical to let 500 drivers set their own rates. The Employer can adjust the rate fares upward or downward depending on market conditions.<sup>27</sup> Most of the time, the Employer increases the rates and Chaudhary testified that in the past, some of the drivers contributed to that decision.<sup>28</sup> Chaudhary testified that on only one occasion, the rates to Newark airport decreased because of the competition. The Employer does not decrease the rates for frequent customers. When on Employer business, drivers are not permitted to charge more than the published fares. However, according to Chaudhary, the drivers can reduce the overall fare by lowering the waiting time costs, or not charging for extra stops or the telephone. A driver would do so for a frequent customer and Employer authorization is not needed. If a driver has a question concerning the rates, i.e., what to charge for a certain number of stops, he calls the Employer's billing department. The drivers need not follow the rate book when transporting private customers.

The Employer contends that it does not instruct the drivers as to when or how to work and that the drivers are free to accept or refuse an assignment. According to Chaudhary, the drivers can choose when to commence and complete their workday, where to work, and when to take a vacation. The Employer's argument in this regard centers on the "book in" system. When a driver decides to commence work, he books in by punching in the zone number on the MDT. This notifies the Employer's dispatch computer that the driver is ready and available to work in the book in zone. The driver can book into any zone he wishes and is not required to provide advance notification of his book in zone. The book in process results in a list comprised of all the drivers booked into each zone. Once the driver books in, the Employer's dispatch computer automatically dispatches a fare in that car's zone. The MDT notifies the driver of the time of the pick up, the address, cross streets, and any special circumstances, e.g., if the passenger is a smoker or is traveling with a dog. If there are 10 other cars that have booked into the same zone, the computer dispatches the fare to the first car booked into that zone. The dispatcher is not involved in deciding

<sup>25</sup> The Employer commingles all these moneys into one account and writes a check to the vendor for the money owed by a number of drivers.

<sup>26</sup> Emp. Exh. 12, sec. 6-04(k)

<sup>27</sup> See Jt. Exh. 1 at sec. 11.16.2.4 of franchise agreement.

<sup>28</sup> Chaudhary did not furnish details concerning drivers input into the rate increases. Recently, the Employer sent a letter to all of its customers explaining the increase in fares. Emp. Exh. 26.

which car is assigned a particular fare. Rather, the fares are distributed by the computer on a first-in first-out basis. As the book in list ceases to exist after 2 hours, the driver must book in again every 2 hours in order to continue receiving assignments. According to Chaudhary, the only time the Employer reserves the right to select a particular driver, as opposed to random computer selection is when a driver is needed to cater to a customer's special requests, i.e., handicapped, sick person, or elderly.<sup>29</sup>

When a driver receives a call from the computer, the driver has 40 to 45 seconds to decide whether to take the fare. If he chooses to accept the assignment, he presses the "AC" button on the MDT. After pressing this button, three blank spaces appear on the MDT screen in which the driver punches in his estimated time of arrival (ETA). If an ETA is not punched in, the computer automatically defaults the ETA at 10 minutes. The ETA information is transmitted to the Employer's dispatch computer and upon receipt of that information, a call-taker from the Employer's dispatch department informs the customer of the ETA and the car number that is dispatched. According to the Employer's franchise handbook, there are maximum ETAs allowed in certain zones. For example, between zones 101 to 112 in Manhattan the maximum ETA that can be entered into the MDT is 15 minutes; between zones 113 to 116, the maximum ETA is 20 minutes; the maximum ETA allowed in other boroughs other than Manhattan is 30 to 60 minutes depending on the zone; and the maximum ETA for each of the New York airports is 10 minutes. If a driver enters an ETA longer than the ones noted above, the call-taker checks with the customer for approval.<sup>30</sup> Once a driver accepts the call, the customer's name, basic rate, and method of payment appears on the MDT. If a customer wishes to pay by credit card, the card approval number is sought by the call-taker if the fare is upwards of \$200. The approval code is transmitted to the driver via the MDT.

The computer dispatches two different types of calls: reservations and on-line. When a reservation is made the computer dispatches the call to the drivers between 15 and 60 minutes before the scheduled pick up time, depending upon the location. The MDT also broadcasts the reservation time. A driver can also ask the MDT to display all reservations to be dispatched within the following 30 minutes. When a driver accepts the call and enters the ETA, the call-taker calls the customer to furnish the car number that will handle the fare and the ETA. An on-line dispatch is when a passenger calls the Employer for a car and the fare is dispatched while the customer waits on the line. When the fare is accepted, the call-taker informs the customer of the car number and ETA. Out-of-town calls, which are generally more lucrative, are the only fares dispatched by the autodispatch system. This system is not based on the first-in first-out approach: rather, as long as the driver is booked into any zones adjacent to the out-of-town call, the autodispatch program will assign the call to the closest vehicle. There is one caveat: out-of-town calls are only assigned to level A, B, or C drivers. Cellular phones, which are not available in every vehicle, as well as pagers, are a prerequisite for out-of-town fares. The Employer also has onsite dispatchers at three

downtown Manhattan sites and at certain television studios where the traffic is heavy and it is difficult for drivers and customers to find one another. The onsite dispatcher is an employee of the Employer who is responsible for guiding a customer to the vehicle or instructing the driver to circle the block until the customer arrives.

According to Chaudhary, the driver is not obligated to accept the assignment dispatched to his computer. Rather, the driver can reject the call by pressing the "reject" button on the MDT. If the assignment is rejected by the first car on the book in list, the computer then dispatches the assignment to the next car on the book in list. The computer will continue to dispatch the assignment until a driver on the book in list accepts the call. A driver can also ignore a call, which is called a forfeit. A forfeit generally happens when the driver is not in his vehicle at the time the computer dispatches the call. The computer waits about 40 seconds to see if the driver accepts or rejects the call. When there is no response, as in the case of a forfeit, the computer automatically dispatches the call to the next driver on the book in list.<sup>31</sup> Theoretically, a driver can return to the car and radio the dispatch office to see if the forfeited call can be reassigned to him. However, Chaudhary testified that in practice the dispatcher is unable to reassign the forfeited call to the driver because the computer has already dispatched the call to the next driver. Although Chaudhary testified that rejecting or forfeiting a call does not result in any penalty, he testified that when doing so the driver is pushed to the bottom of the book in list. Therefore, he is the last one on the list to receive an assignment. Also, the franchise handbook states that when rejecting a fare, the driver must book in again to receive another assignment.

With regard to rejection of fares, Chaudhary testified that if a driver rejects a fare between 7 and 11 p.m., he is restricted from booking in again for 30 minutes. According to Chaudhary, this is to allow the driver some time to correct whatever problems kept him from accepting the call. If the driver is able to fix the problem before the 30 minutes has expired, he must call the dispatcher who can clear the 30-minute restriction.<sup>32</sup>

According to Chaudhary, the Employer does not ensure that there are a certain number of vehicles booked into each zone. There are many instances, according to Chaudhary, where there are no drivers booked into a particular customer's zone. In these circumstances, the computer dispatches the assignment to the next available vehicle in the customer's backup zone, which can be any zone adjacent to the customer's zone. Chaudhary testified that the MDT notifies the drivers in which zones there are fares available. The driver can then conditionally book into these zones, and if he is the first to arrive on scene he receives that assignment and is booked off the original list he was on. If he is not the first vehicle on scene, he retains his position in the original zone.<sup>33</sup>

<sup>31</sup> Some drivers have a whistler which they use when they are out of the vehicle. This device notifies them that a call is coming in on their MDT and they have 40 seconds to respond to the call.

<sup>32</sup> Although the Employer's handbook indicates that all rejections result in a 30-minute restriction Chaudhary testified that this applies only to the 7 to 11 p.m. time period. Rejections during any other part of the day results in placement at the end of the book in list

<sup>33</sup> See Jt. Exh. 3, at sec. 3.2.

<sup>29</sup> See Jt. Exh. 1 at sec. 12.4 of the franchise agreement.

<sup>30</sup> See Jt. Exh. 3, at sec. 12.1.

At any time, the driver can inquire as to his position on the book in list. He does so by pressing the “QP” (query position) button on the MDT. If a driver is not satisfied with his place on the list within that zone he can book into another zone. The driver can also perform a zone query to determine the number of cars waiting in a particular zone. The driver also has the option of a temporary book out, also known as a temporary off, which means that he can retain his position on the list for 15 minutes if he needs to leave the vehicle for a rest room break. A driver can only use a temporary off once for each zone he books into.

Chaudhary testified that the Employer limits the number of cars at Kennedy, Laguardia, and Newark airports, which is called a zone limit. For example, if there are a number of cars at the airport that have been waiting for some time to receive a fare, the Employer restricts any additional book ins in that zone. As a result, the driver will have to book into another zone to receive an assignment. Chaudhary testified that the restrictions take effect when the book in list is not moving. According to Chaudhary, the restriction assists the drivers by sending them to zones where there are available fares. An employer witness, Mushtaq Ali, who is a driver testified that the zone limits described above can happen in any zone. However, he also testified about a zone purge, which he defined as a zone where there is no more work available. Ali indicated that purges occur daily at Newark airport.<sup>34</sup> For example, if a driver who booked in at Newark remains on the list for one hour without a fare, the driver has two choices: book into another zone with fare availability, or remain idle and risk being sent home. Although all testified that drivers cannot be forced to book into any particular zone, he also testified that whenever the Employer declares a zone full, the driver cannot receive a fare in that zone; rather, the driver must book into another zone to get work.

If a driver is delayed for more than 5 minutes while on route to a customer, he must press the update code button on the MDT to notify dispatch of the new ETA. The call-taker notifies the customer of the new arrival time. This function is designed to prevent the call-takers from constantly checking on the location of a vehicle. If the driver is delayed for more than 10 minutes, the driver should request a “bail out” as soon as he realizes that the ETA cannot be met. A bail out is where a second vehicle close to the pick up point relieves the first vehicle from the assignment because the first vehicle encountered traffic, had an accident, or experienced mechanical difficulties. If the driver bails out due to mechanical trouble he must wait 2 hours before the next book in. According to Chaudhary, the 2-hour waiting time is to afford the driver an opportunity to fix the problem.<sup>35</sup>

When a driver arrives at the customer pick up point, he presses the “on-scene” button on the MDT which records the exact time he arrived. If the driver is unable to stay in front of the pick up address, he circles around the block and notifies the dispatcher by pressing the “circling” button on the MDT. The driver also should notify the dispatcher how

much time it will take to circle.<sup>36</sup> When the customer gets into the car, the driver presses the “load” button on the MDT which records the time the customer got into the vehicle. It is important to press the on scene and load buttons, because the Employer charges a customer for waiting time. The customer has about a 24-minute grace period from the time of dispatch before waiting time charges commence. The scale of waiting time charges is published in the rate book.<sup>37</sup> A customer can request a guaranteed waiting time wherein the driver waits until the customer arrives, no matter how long it takes.

If the customer does not arrive, the driver presses the “no show” button on the MDT which informs the dispatch department to call the customer to find out the reason for the delay. Generally, a no show is a customer who is not at the pickup site or who does not spot the driver. The Employer’s franchise handbook guides the driver as to when the no show button should be pressed, i.e., 25 minutes after dispatch.<sup>38</sup> The driver is not allowed to leave until the dispatcher authorizes him to leave. If a driver waits for the customer and the customer never arrives the Employer tries to bill the customer for the waiting time and for failing to show up. If the customer does not pay the fee the Employer reimburses the driver from a Sunshine Fund, which is described in more detail below. Marcella of the bookkeeping department or Dham determines how much to reimburse the driver in case of a no show.<sup>39</sup> If a no show is attributed to the driver’s conduct, i.e., tardiness or waiting at the wrong address, he will not be paid for a no show.

If the customer cancels within 24 minutes of dispatch and the driver is already on route, there is no charge to the customer and the driver does not get paid anything for that job. If the job is canceled after 24 minutes, the customer is billed and the driver is paid as a no show.<sup>40</sup> If the driver has picked up the wrong customer and has departed the pick up location, the dispatcher is to be contacted. If the passenger is an Employer customer, albeit the wrong customer, the driver is not to return the passenger to the pick up point; rather, the passenger is to be driven to the destination point while the dispatcher sends another vehicle to pick up the original passenger. If the passenger is not an Employer customer, the passenger is to be let out of the vehicle or dropped off at the pick up point. Then the driver is to look for the correct passenger. If the driver has gone too far to return the passenger, he is supposed to secure a bail out. If the original customer is no longer at the pickup site, the driver is not entitled to collect no show money.<sup>41</sup>

Once a customer is in the vehicle, the driver is to ask whether the customer has a preferred route. If the customer wishes to make a stop along the route, the Employer does not charge for the first 5 minutes of waiting time on the stop. If the driver waits for longer than 5 minutes, the Employer charges \$2 for every subsequent 5-minute waiting period. The Employer also has different charges for stops on route and stops that are not on the route. The Employer’s rate book explains these charges. If a customer wants a return trip

<sup>34</sup> Another Employer witness, driver Dawood Emanuel, confirmed that he had only experienced purges at Newark airport. He has not been purged from any other zone.

<sup>35</sup> See Jt. Exh. 3, at secs. 16.1 and 16.2.

<sup>36</sup> See Jt. Exh. 3 at sec. 17.1 and 17.2.

<sup>37</sup> See Jt. Exh. 4.

<sup>38</sup> See Jt. Exh. 3, at sec. 17.4.

<sup>39</sup> See Jt. Exh. 3, at sec. 28.5.

<sup>40</sup> See Jt. Exh. 3 at sec. 17.3.

<sup>41</sup> See Jt. Exh. 3 at sec. 19.3.

and asks the driver to wait at the destination point until the customer is ready to return, a certain amount of free waiting time is allowed, depending on the price of the fare. The rate book also explains these charges in detail. The same driver can be used as the customer's ride back provided that the driver notifies dispatch to ensure that another driver has not already been dispatched for the return fare.

On unloading the passenger, the driver presses the "unload" button on the MDT. A driver is given the opportunity to book into the drop off zone 15 minutes before he unloads the passenger. To do so he presses the "soon to be clean" button on the MDT. If the driver does not unload within the allotted 15 minutes after booking into the drop off zone, he loses his position on that book in list. When a customer has been dropped off at his destination point, the driver can book into any zone provided he can be there within 15 minutes. If he cannot reach that zone within the 15 minutes, he should book into another zone that he is able to reach within the 15 minutes. When booking into another zone, one automatically books out of the original book in zone. When a driver wants to end his workday, he can request a going home fare, which is a fare whose destination point is close to the driver's home.

If a driver receives a ticket, i.e., stopping in a no-stopping zone, while on Employer business, the driver is responsible for paying that ticket. Although the driver is not required to notify the Employer about the ticket, the Employer provides any records including computer dispatch records, which could prove helpful in fighting the ticket. If the driver receives a moving violation ticket, there is little that the Employer can do to assist him. The Employer does not take any disciplinary action against the driver for the tickets unless they violate TLC rules. When a driver has an accident, or is stopped by a police officer while transporting a passenger, he is to request a bail out. The Employer also requires that a copy of the police and insurance reports be submitted to it.

With regard to Employer's billing system, each driver receives a batch of Employer vouchers which are kept in the vehicle. Each voucher is numbered and these numbers are logged into the Employer's computer to protect against trading vouchers from one car to another. Each voucher is a triplicate form akin to a billing invoice. The driver fills in the following information on the voucher: account number, passenger identification, passenger name, company name, date, car number, job number, driver identification number, dispatch time, ETA, reservation time, pickup time, waiting time at the pick up point, zones where stops were made, waiting time at each stop, remarks, basic fare, tolls, parking, packages charges,<sup>42</sup> airport charges, phone charges, tips, credit card approval code, and total cost of the fare.<sup>43</sup> Occasionally, the customer will fill in the pick up and final destination information on the voucher. On the voucher there is a space for the customer to initial the waiting time and stop fees. The Employer instructs the driver not to fill out the voucher in

front of the customer because doing so can cause nervousness resulting in mistakes. The Employer suggests that the drivers fill out the voucher as each fee occurs, i.e., tolls, waiting charges, stops, so that he will not forget the details.<sup>44</sup> The Employer currently charges the customer \$1 as a voucher processing fee. The voucher must be signed by the customer.<sup>45</sup> The driver and customer each keep one copy and the third copy is submitted to the Employer's billing department. If the customer refuses to sign the voucher, the Employer investigates the matter and if it determines that there was nothing wrong with the driver's service, the Employer bills the customer even though the voucher was not signed. If customer refuses to pay the bill, the driver does not receive any money for that voucher.

Some customers have an Employer-issued VIP card for billing and other customers have preprinted vouchers when using the Employer's services. These are called closed accounts. The driver uses the credit card machine to imprint the VIP card on the voucher. If a passenger has a closed account but forgets to bring the preprinted voucher, the driver contacts the dispatcher for instructions on whether or not to transport the passenger. Sometimes the dispatcher requests that the driver obtain identification and fill out a regular voucher under that passenger's name.

When the vouchers are turned in, the Employer formally bills the customer. If the voucher has not been completely priced out when it is submitted, the Employer's bookkeeping department completes it. Although the franchise agreement states that the drivers are not paid for vouchers turned in more than 14 days after the assignment, Chaudhary testified that this provision is never enforced. According to Chaudhary, the drivers can wait up to a month to submit their vouchers and even under those circumstances, 99 percent of the drivers get paid for late submitted vouchers. However, if the Employer's bill is delayed due to the late submission of the vouchers and the customer refuses to pay the late bill, the driver is not paid for that fare. All disputes concerning payment for vouchers are decided by the Employer's customer service department.

The drivers can elect on which basis they wish to be paid; on a daily basis, weekly basis, or monthly basis. Twenty-five percent of the drivers are paid on a monthly basis, 25 percent are paid on a weekly basis, and 50 percent are paid on a daily basis. The Employer keeps a percentage of the face value of each voucher submitted excluding tolls, tips and other out of pocket expenses for the driver. However, the percentage varies based on driver's payment schedule, i.e., 17 percent is kept from each voucher submitted from drivers who are paid on a monthly basis; 19 percent is kept from each voucher submitted from drivers who are paid on a weekly basis; and 20 percent is kept from each voucher submitted from drivers who are paid on daily basis.<sup>46</sup> The remaining 83 percent, 81 percent, or 80 percent represents the drivers' revenue. The drivers keep 100 percent of all cash

<sup>42</sup> The Employer also delivers packages and has special rates therefor.

<sup>43</sup> The call-takers in the dispatch office secure the credit card approval code which is transmitted to the drivers via the MDT. The drivers use the credit card machine in their vehicle to imprint a credit card receipt. Telephone charges are explained in the Employer handbook and rate book.

<sup>44</sup> If a driver takes a customer via a toll route he can only charge for the return toll if there is no other way to return to Manhattan.

<sup>45</sup> The Employer suggests that the driver refrain from asking a customer to initial waiting time and stop charges until the end of the ride because it can anger the customer.

<sup>46</sup> The Employer last increased the percentages it retains in 1991.

fares. Chaudhary did not know the percentage of fares paid in cash and fares paid by voucher or VIP card.

The parties stipulated that the TLC regulates the industry. The TLC requires that the Employer maintain records of fares, i.e., when the fare came in, the ETA, and which car was used to pick up the fare. The TLC also requires that the Employer maintain a record of drivers' licenses, permits, and complaints made regarding the Employer's service. If a customer complains to the TLC, it sends a copy of the complaint to the Employer and provides 10 days for a response thereto.<sup>47</sup> The parties stipulated that the Employer responds to customer complaints because it is required by TLC rules and because it enhances the goodwill of the company. The record evidence established that when a driver received a citation from the Port Authority of New York/New Jersey for failing to have a motor vehicle tax stamp, the TLC rules required that the Employer suspend that driver's ability to take assignments. According to Chaudhary, the Employer required proof that the matter was rectified before allowing him to book in again.<sup>48</sup>

With regard to customer complaints, a customer files a complaint by speaking to the Employer's sales and marketing department or a call-taker in the dispatch department. The complaint is recorded on the Employer's customer complaint form. The form contains the following: date filled out, date of offense, time, account number, customer name, car number, job number, driver identification number, telephone number, description of offense, amount of fine, and a space for a signature.<sup>49</sup> Some customers write complaint letters. The Employer's quality assurance manager, Phillip George, questions the driver about his version of events. If the customer complaint involves serious problems, such as a dented or dirty car, broken windshield, poor tires, or a braking problem, George radios the driver and asks him to immediately come to the Employer's headquarters to discuss the matter. Less serious matters involve, for example, a broken light. If George determines that the customer's complaint is valid, George instructs the driver to fix the problem. If it is a serious problem as described above, the Employer does not dispatch the driver until the matter is rectified. According to Chaudhary, drivers have refused to fix certain problems although the record does not detail what occurs in these circumstances. Some complaints involve overcharges for tolls, waiting time, or stops. If a driver admits the mistake, the Employer charges the driver for the overcharge by deducting said amount from his paycheck. On occasion, the customer's account is credited for the overcharge. If there is a discrepancy regarding the driver's and customer's version of the complaint, the Employer attempts to find a compromise. The record evidence showed that on one occasion, a customer complained that a driver beat him up. The driver contended that the customer beat him up. The Employer told both parties to file police reports and the driver was "counseled"

with a verbal and written warning. When a similar complaint was filed concerning the same driver, the driver's franchise agreement was terminated.<sup>50</sup> In circumstances where complaints are filed about a driver's rude behavior, the Employer lectures the drivers about the proper code of conduct. All decisions regarding complaints are made by George, who records his decision on the complaint forms and signs them.<sup>51</sup> The information on the complaint form is entered on the computer and copies thereof are placed into the driver's file. Although the Employer's handbook indicates that any customer complaint results in downgrading the driver's level, Chaudhary testified that such action is not automatic.

The Employer has certain rules and regulations that are outlined in the franchise handbook or in the franchise agreement. The Employer contends that some of these rules are simply good business guidelines, others are necessary pursuant to TLC and FCC regulations, and the remainder are mutually beneficial to both the Employer and the franchisee driver. In fact, the TLC rules require that the Employer maintain and enforce rules governing the conduct of affiliated drivers while performing their duty as for-hire vehicles and that the Employer's rules and regulations must be submitted to the TLC.<sup>52</sup> Infractions or violations of the Employer's rules can result in disciplinary action, including fines, suspension, or termination of the franchise contract. The Employer's franchise handbook contains a schedule of all penalties imposed by the Employer for many different infractions, including the ones detailed below. The Employer developed the following categories of infractions: abandonment, accident reporting and notification, book in procedures, business compliance, operating licenses and documents, communication policies, conduct at base, conspiracy, customer courtesies, customer relations, dispatch procedures, dress code, ETA, MDT functions, notification status, operation of vehicle, voucher processing and overcharging, personal hygiene, pickup procedures, late on out-of-town pickups, public relations, and vehicle maintenance. There are incremental increases in the sanctions for the first, second and third offense for each category. There are monetary fines for nearly every category ranging from \$250 to \$2000. Three categories involve downgrading the driver level, some require restrictions on booking in, and for 13 categories the final offense is expulsion, i.e., terminating the franchise agreement. All decisions regarding sanctions are made by Quality Assurance Coordinator George. However, they can be appealed to Chaudhary who reserves the right to increase or decrease sanctions or penalties imposed by George. Any fines imposed are deducted from the driver's paychecks. All fines collected by the Employer are placed in a Sunshine Fund, which lends money to drivers who need money to fix their vehicles, make an insurance payment, or repossess an im-

<sup>47</sup> Emp. Exh. 16. Although there is evidence that the Employer responded to customer complaints before the TLC was notified, Chaudhary testified that this is simply good business practice.

<sup>48</sup> Emp. Exh. 15.

<sup>49</sup> Emp. Exh. 6.

<sup>50</sup> The record does not contain any written documents concerning this driver's warning or contract termination.

<sup>51</sup> As described more fully below, all decisions made by George in his capacity as quality assurance coordinator can be appealed to Chaudhary.

<sup>52</sup> Emp. Exh. 12, sec. 6-03(e).



pounded car.<sup>53</sup> Some of the penalties for violations of the rules include the following:<sup>54</sup>

With regard to the operation of the vehicle, any driver who drives in a reckless manner, drives while under the influence of drugs or alcohol, or drives when sick, tired, or working in excess of 16 hours a day, are subject to a \$500 to \$1000 fine and contract termination for the third offense. The vehicles must be insured and all licenses, registration, and permits should be in order. Failure to do so can result in a \$500 to \$1000 fine accompanied by suspension of assignments until the matter is remedied. The third offense results in contract termination. Failure to notify the Employer of an accident while a passenger is in the car, request a bail out in case of an accident, and have the car inspected and approved by the Employer after an accident can result in \$500 to \$1000 fines and contract termination for the third offense.<sup>55</sup> An unclean vehicle, a damaged exterior, poor mechanical maintenance, and failure to use the Employer's magnetic sign while on Employer business is subject to a \$250 to \$1000 fine and downgrading for 3 days for the third offense. Chaudhary testified that these rules are good business decisions benefiting the drivers, the Employer, and the customer. Additionally, certain items protect the Employer from liability.

The Employer has a dress code requirement of pressed and starched white shirts, a sports jacket, black, blue or gray pants, polished dress shoes and a solid color overcoat. The drivers can obtain an Employer designed tie free of charge. Drivers are specifically not permitted to wear sneakers, jeans, tee shirts, sandals, zipper jackets, down vests, or baseball jackets. According to Chaudhary, the dress code is beneficial to drivers. Although he claims the dress code is not strictly enforced, any driver who fails to observe the dress code can be fined between \$250 and \$1000. The Employer also has personal hygiene guidelines to protect against customer complaints: shower daily, change all clothing daily, do not wear the same suit pants or blazer 2 days in a row, use deodorant and a mild cologne, beards should be trimmed, use mouthwash and brush teeth, and trim fingernails regularly. The Employer claims that these guidelines are designed to protect against fights between customers and drivers. Failure to abide by the personal hygiene guidelines results in a \$250 to \$1000 fine and termination of the contract for the third offense.

When arriving at the pick up location, the driver may not falsely represent that he is on scene or that he is circling. Nor can the driver falsely represent that he has unloaded a passenger. Should the dispatcher find out about these matters, he may fill out a complaint form. The complaint form is transmitted to George who can impose disciplinary action

<sup>53</sup> General Manager Jaffee decides whether a driver has sufficient reason to borrow money from the fund. A driver can borrow up to \$500 without a reason. When returning money to the fund, the driver pays a small amount above the borrowed amount, somewhat akin to interest. The Sunshine fund is also used to pay drivers for a no show.

<sup>54</sup> There are many other infractions and penalties described in the Employer's handbook.

<sup>55</sup> Although the schedule of penalties does not set forth any sanctions for failing to have the Employer inspect and approve the vehicle after the accident. Chaudhary testified that failure to do so could result in sanctions.

including a \$250 to \$1000 fine. Failure to use the ETA update function, excessive lateness or bail outs, and requesting late bail outs in the case of out-of-town calls, are subject to \$100 to \$500 fines and a downgrade for 6 months. When transporting a package, a driver must go directly to the drop off point and cannot use the conditional book in or soon to clear feature. Failure to follow these instructions can result in a \$100 to \$500 fine.

With regard to vouchers, the drivers are instructed not to leave completed vouchers in their vehicle. The drivers are not permitted to submit a voucher if they have already been paid in cash and the voucher cannot list extra tolls that were not taken. This is considered overcharging for which there is a \$1000 to \$2000 fine and contract termination for the third offense. Vouchers that were returned by the customer because they were not completed properly can result in a \$100 fine.

While on route, the Employer requires the drivers to be courteous, to smile, to lock the doors, and to ask the customer for a preferred radio station and a preferred route. The drivers are instructed to avoid playing ethnic or religious music, talking to the customer unless he/she engages in conversation, discussing politics, religion, personal matters or Employer business, making personal phone calls, smoking, arguing with the customer, asking for or criticizing a tip, borrowing money from a customer (even for tolls or parking), or directing any racial or offending remarks toward other vehicles while displaying the Employer's magnetic sign. Chaudhary testified that these rules address safety concerns, are good business practice for the mutual benefit of drivers and the Employer, and avoid problems with customers and drivers.<sup>56</sup> If there are customer complaints regarding these items, the driver can be subject to a \$250 to \$1000 fine including contract termination for the third offense. The Employer also requires that drivers speak English while communicating on the voice radio, avoid profanity and abusive language, and keep conversations brief. The Employer contends that these rules are dictated by FCC regulations and that it can suspend or terminate a driver using profanity.

Excessive failure to secure authorization via MDT before using the voice radio and entering the dispatch room without authorization can result in \$250 to \$1000 fines and contract termination for the fourth offense. Chaudhary testified that these rules are an attempt to maintain a fair dispatch system by avoiding any opportunity of collusion between drivers and call-takers or dispatchers.<sup>57</sup> In this regard, Chaudhary testified that socializing with the dispatch office staff and giving them rides or bringing them food and beverages even if paid for is also subject to penalties.

The Employer's rules and regulations are frequently enforced by the quality assurance committee which is comprised of 30 drivers. Chaudhary testified that the drivers volunteer for the position of committee member but that he chooses which ones serve in that capacity based on their record. All committee members receive \$25 a week as a credit toward their \$50 weekly service fee. Quality assurance committee members perform their work while they are driv-

<sup>56</sup> Chaudhary admitted that these rules are not dictated by the TIC or FCC but are imposed to avoid arguments with customers, which rises to the level of a safety concern.

<sup>57</sup> All telephone and radio communications in the dispatch room are recorded and monitored.

ing their own vehicles. For example, if a committee member encounters another Employer vehicle while on duty, he inspects the vehicle and fills out a road inspection log. The log has columns for comments on the following: date of inspection, car number, location of magnetic sign, time, zone, car condition (i.e., clean, dirty, dents, and remarks), and dress code (i.e., tie, jacket, and remarks).<sup>58</sup> The committee member submits the inspection log whenever he has an opportunity to do so. Quality Assurance Coordinator George reviews the log and calls the driver to the office to review the problems. If George finds the car dirty, he instructs the driver to clean it, and the driver is not dispatched until he does so. A committee member also has the power to stop a driver on the road if he observes a problem. In this regard, Chaudhary testified that a committee member who spots a dirty car can stop that car immediately and can instruct the dispatcher to cease dispatching assignments to that driver. However, Chaudhary was unable to indicate whether the dispatcher follows the committee member's instructions. If a driver is suspended from receiving assignments because of a dirty vehicle, he can clean the vehicle, ask the dispatcher to arrange for a committee member to inspect the car, and request that the committee member approve the car for work. Although Chaudhary testified that the committee members recommend that action be taken against a driver and that the Employer accepts those recommendations, he later testified that the committee members simply report the matter to George who is the ultimate decision maker regarding disciplinary action. The Employer contends that the committee plays an important role in ensuring that the handbook is followed and that the drivers are presentable to the public.<sup>59</sup> However, the quality assurance committee is not consulted regarding any penalties or fines assessed by the Employer. Any committee member who violates the regulations delineated in the Employer's handbook is assessed double fines.<sup>60</sup>

Based on all of the foregoing, the Employer contends that the drivers are independent contractors. In its brief, the Employer argues that the drivers run their own franchises, have equity in their business, purchase their vehicles, pay their own expenses, make their own hours, and pay a service fee even if they do not work. The Employer also argues that the franchisee's power to employ drivers is sufficient evidence to support an independent contractor finding. Additionally, the Employer relies on that the franchisees file their own profit and loss and self-employed IRS statements, have signed contracts stating that they are independent contractors, and do not receive any benefits from the Employer. Finally the Employer argues that its rules and regulations are simply a restatement of government requirements, or involve safety concerns, or ensure that customers are properly cared for. Ac-

cordingly, the Employer argues that the rules benefit both the Employer and the franchises and do not evidence control over the drivers.

The Petitioner asserts that the drivers are employees of the Employer due to the Employer's control over their work. Only two witnesses testified on the Petitioner's behalf, drivers Aijaz Alamdar and Abdul Khan. Alamdar has been a franchisee driver for 3 years. He testified that he derives all of his revenues from the Employer's assignments, that he has never received any assignments from any other employer, and that he has never transported private customers. According to Alamdar, 99 percent of his revenues are derived from the Employer voucher system and nearly none of the assignments are cash fares. With regard to book in procedures, Alamdar testified that he prefers to book into midtown and downtown zones because of the frequency of calls. However, Alamdar testified that the Employer can manipulate a driver's book in zone by declaring zone limits, wherein the Employer limits the number of drivers booking into certain zones. For example, if the Employer wants the drivers to book into a specific downtown zone because it is busy there, a zone limit will be declared for other surrounding zones, forcing the driver to book into the busy open zone. Alamdar testified that this occurs on a daily basis during rush hour. Alamdar also testified about purging. Contrary to the Employer's witness' testimony, Alamdar defined a purge as the amount of time a driver can spend on a book in list waiting for a fare before he is removed from the list. According to Alamdar, this happens at Laguardia airport, where a driver can remain on the book in list until the dispatcher decides that the driver has waited too long for a fare and will remove him from the list. Thereafter, the driver is forced to book into another zone to receive a fare. Alamdar testified that the purge time is at the discretion of the dispatcher. Khan, a franchise driver since 1986, confirmed that he has been purged from a Laguardia book in list at least four times. The most recent incident was 2 months ago when he booked into the Laguardia zone, because it is near his home. He waited for about 2 hours until he finally rose to the first position on the book in list. A few minutes later, he checked his position on the list and found that he was no longer on the book in list. He was informed by the dispatcher that a purge was in effect. Therefore, he booked into another zone. With regard to zone limits, Khan testified that the Employer declares zone limits between 7 and 11 p.m.

The Board applies the common law right-of-control test to determine whether individuals are independent contractors or employees within the meaning of Section 2(3) of the Act. Under this test, an employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in achieving such ends. On the other hand, where control is reserved only as to the result sought, an independent contractor relationship exists. The resolution of this question depends on the facts of each case, and no one factor is determinative.<sup>61</sup> In the taxicab industry, the "right of control" has been refined to include two dispositive elements: (1) the employer's control over the manner and the means by which the drivers conducted business after leaving the company garage, and (2)

<sup>58</sup> Employer Exhibit 22.

<sup>59</sup> Driver Mushtaq Ali, who is a member of the quality assurance committee, testified that he has proposed some rule changes, although he did not indicate whether his proposals were accepted by the Employer.

<sup>60</sup> Although the Employer's franchise handbook states that the quality assurance committee holds hearings, imposes sanctions, and makes decisions regarding certain violations, Chaudhary testified that they do not do so. In practice, the committee members report the matter to George who runs the hearings and makes decisions. Also there is no longer a \$30 fine for failing to appear before the committee.

<sup>61</sup> See *Roadway Package System*, 288 NLRB 196 (1988); *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968).

the relationship between the company's compensation and the amount of fares collected.<sup>62</sup> The Board has also held that requirements imposed by governmental regulations do not constitute control by an employer, but is control by the governing body.<sup>63</sup> As in many cases of this type, some of the facts herein support a finding that the drivers are employees within the meaning of Section 2(3) of the Act while others point to an independent contractor relationship. In my view, the facts herein weigh more heavily in favor of finding that the Employer's drivers are employees and not independent contractors inasmuch as the record evidence establishes, *inter alia*, that the Employer exercises substantial control over the drivers in the course of their performing their driving duties and because the Employer has a considerable financial stake in the money earned by the drivers.

There is no disputing that the drivers purchase or lease a franchise, sign a franchise agreement, pay a weekly service fee to the Employer even if they choose not to work, pay for many of their own expenses including licenses, registration, permits, maps, and traffic tickets, decide when to book in, finish work, take a vacation, or change a zone if unsatisfied with the position on the book in list, and can lower the overall cost of a fare by reducing the waiting time and stop charges. In addition, the Employer does not withhold any taxes for the drivers, issues them 1099 forms, and the drivers file self-employment and profit-and-loss statements with the IRS. There is also evidence that the New York State Department of Labor denied the unemployment claim of one of the Employer's drivers. While these factors point to an independent contractor relationship, there are many others which favor employee status.

Thus, the evidence shows that the drivers derive all of their income from the fares dispatched by the Employer. Although the Employer contends that the drivers may work for another company, there is insufficient evidence to support that this occurs.<sup>64</sup> Moreover, despite the Employer's contention that the drivers can transport private passengers, the TLC rules prohibit them from doing so. There is also evidence that the Employer finances one quarter to one third of the vehicles driving on its behalf and requires that fire, theft, and collision insurance be maintained on those vehicles. The Employer assists in financing the purchase price of a franchise. With regard to benefits, the Employer has a death benefits fund to which it contributes. The Employer also administers the Sunshine fund and determines how much money a driver can borrow therefrom. The Employer promotes drivers to a higher level based on their experience and record, which promotion affords the drivers the opportunity to receive more profitable assignments. There is a 1-year probationary period

wherein a driver's contract can be terminated if too many customer complaints are filed. There is also some evidence that the Employer has been held to pay workman's compensation in the past.

While it is true that the drivers maintain their own hours, there is an abundance of evidence that the Employer regulates many other matters pertaining to the drivers. In this regard, the evidence shows that the Employer has a computer system designed to locate a driver and keep track of the zone the driver is in. Failing to unload a passenger within 15 minutes after pressing the soon to be clear button on the MDT results in losing the position on the book in list. A driver must book in every 2 hours in order to receive assignments. A driver cannot leave the site of an alleged no show without dispatcher approval. Additionally, the driver is paid for a no show from the Employer's Sunshine fund. The Employer also controls breaktimes by permitting only one temporary off per book in zone. A telling sign of control is the Employer's zone limits where there is a restriction on the number of vehicles that can book into a zone. The Employer also has purged drivers from a book in list if the drivers have been waiting too long for a fare. Although the Employer argues that the zone limits and purges benefit the drivers by releasing them to find available fares, the zone limits and purges are really an attempt to maneuver their locations.<sup>65</sup> And, while the Employer argues that the driver can reject a fare, in practice, the driver is punished for rejections by forcing the driver to the end of the book in list where the driver is the last to receive a fare<sup>66</sup> or is forced to book in again. Additionally, if a fare is rejected between 7 to 11 p.m., the driver is restricted from booking in for 30 minutes, which the Employer contends allows the driver to fix whatever problem kept him from accepting the assignment. Thus, the implication is that a fare cannot be rejected simply, because a driver does not want that fare; the fare rejection must be justified by some problem experienced by the driver or the vehicle.

With regard to the payment system, the Employer contends that the drivers keep all of their cash fares. However, the evidence shows that nearly all of the driver's fares are recorded by the voucher system. The Employer retains between 17 percent to 20 percent of the face value of the vouchers which the Employer contends represents the cost for billing and collection of fares. Yet, the Employer also charges its customers \$1 per voucher which it asserts is a voucher processing fee. In addition to the money obtained from the vouchers, the Employer also receives a weekly fee for use of the MDT and radio and a \$100 per week lease fee. Thus, the moneys deducted from the face value of the vouchers appear to represent more than simply administrative costs attached to bill collection. It is the Employer's revenue. Clearly, the Employer has a substantial and direct financial stake in the amount of fares collected by the drivers.<sup>67</sup>

<sup>62</sup> See *City Cab of Orlando*, supra at 1193. Also see *Air Transit*, 271 NLRB 1108, 1110 (1984), citing *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862, 880 (D.C. Cir. 1983); *Checker Cab Co.*, 273 NLRB 1492 (1985).

<sup>63</sup> *Checker Cab Co.*, supra.

<sup>64</sup> *Yellow Cab of Quincy*, 312 NLRB 142, 145 (1993), where the Board found that one of the factors in determining the drivers to be employees was that a majority of the fares were derived from the employer's dispatch system. Compare *City Cab Co. of Orlando*, 285 NLRB 1191, 1206 (1987), where it was found that the drivers earn revenue without utilizing the employer's voice dispatch system. The drivers also developed relationships with the hotels and charter and tour services in order to secure more customers.

<sup>65</sup> *Yellow Cab of Quincy*, supra. There the employer testified that it determines the number of cars on the road at any particular time.

<sup>66</sup> Although I note that the driver can book into another zone if he is unsatisfied with his position on the list.

<sup>67</sup> *Metro Cars, Inc.*, 309 NLRB 513, 517 (1992). In that case, the employer was found to be dependent on the drivers' sales activity for profit because it retained 55 percent of the drivers' gross sales before returning the remainder to the driver. These drivers were found to be employees. Also see *Yellow Cab of Quincy*, supra, where the Board held that the drivers were employees because the

Equally compelling are the extensive rules and regulations that have been established by the Employer and the sanctions imposed for violations thereof. Arguably, some of the rules are dictated by government regulations. For example, failure to have the appropriate licenses, registration, insurance, motor vehicle stamps, and driving under the influence of alcohol or drugs, are regulated by the State. Some rules were instituted to insulate the Employer from liability, i.e., copies of police and insurance reports are to be submitted to the Employer in case of accidents, notification to the Employer of an accident with a passenger in the vehicle, and inspection of the vehicle after the accident. There are also certain common sense rules regulating the condition of the vehicle as well as the driver's behavior i.e., keep the car clean, be courteous, and do not solicit tips, make racist remarks, have fights with passengers, or overcharge. Failure to follow these rules can result in fines, or even contract termination. On their own, these rules would not necessarily evidence the Employer's control over the drivers. Indeed, the Board has found that to require taxicabs to be neat and clean, or to require that drivers act in a courteous manner, constitute only a minor degree of control that would not be inconsistent with a finding of four independent contractor status.<sup>68</sup> However, in the instant case, the Employer's control is very extensive; the Employer has essentially micromanaged the drivers on issues that do not involve government regulations and has imposed a detailed and severe system of sanctions to enforce the rules it wants the drivers to follow. For example, the Employer has rules regarding driving when tired or sick. While a safety issue could arise concerning a tired or sick driver, the punishment for driving when sick or tired is very severe; contract termination. Similarly, it appears excessive to fine or eventually terminate a contract because the driver played eth-

Employer received a percentage of drivers' fares. There, the Employer employed a mileage based rental system whereby the fares paid by the customer to the drivers was based on mileage and the rental fee paid by the drivers to the employer was also based on mileage. In this regard, the cases cited in the Employer's brief, specifically, *Yellow Taxi of Minneapolis v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983), denying enf. 249 NLRB 265 (1980); *NLRB v. Associated Diamond Cabs*, 702 F.2d 912 (11th Cir. 1983), denying enf. 254 NLRB 1052 (1981); and *Seafarers Local 777 (Yellow Cab) v. NLRB*, 602 F.2d 862 (D.C. Cir. 1978), denying enf. 237 NLRB 1132 (1978), are distinguishable. In *Yellow Taxi*, the employer offered a wide range of leasing arrangements, all based on flat fixed rental fees. In *Seafarers* and *Associated Diamond*, the employers charged a flat fee plus mileage charges for leased cabs. The mileage fee in both cases was a small percentage of the fee paid by the drivers. Similarly, in *City Cab of Orlando*, 285 NLRB 1191, 1205 (1987), on which the Employer heavily relies, the facts show that the companies' revenues were not affected by the drivers efforts but rather remained constant by virtue of the set fee arrangements with the lease drivers. A flat fee is evidence of an independent contractor relationship because it places on the drivers a strong incentive to maximize their trips, since, once the flat fee is recouped, income is largely profit. In addition, a flat fee insulates a company from variations in income because regardless of the drivers' earnings the company receives the same amount from the drivers. In the instant case, the fact that the Employer retains between 17 percent to 20 percent of voucher fares, in addition to lease fees and other service fees, evidences a direct correlation between the Employer's income and the amount of fares collected by the drivers.

<sup>68</sup>*Seafarers Local 777*, supra, and *Associated Diamond*, supra. Also see *City Cab Co. of Orlando*, supra, 285 NLRB at 1194.

nic or religious music, engaged in personal conversations, or forgot to ask the passenger for a preferred radio station or route. While dress and hygiene codes may be important service factors. here, they are very detailed and the termination of a drivers' contract is an option if the driver fails to follow the personal hygiene guidelines.<sup>69</sup> I also note that the Employer exercises control by virtue of its requirement that the back of each vehicle have reading lights and antennas for cellular phone service, and rules requiring that the rugs be shampooed every 3 weeks, the windows cleaned once a week, and the ash trays dumped twice per shift. While there are FCC rules that prohibit profanity while using the voice dispatch system, the Employer also has additional rules regarding use of the voice dispatch. The Employer requires that permission be secured via the MDT prior to using the voice dispatch system and excessive failure to do so can result in fines and contract termination. The Employer also does not permit the drivers to enter the dispatch room without authorization nor does it allow socialization with the call-takers or dispatchers. Although the Employer contends that these rules are designed to protect against favoritism, they control the drivers' behavior. With regard to the Employer's rules concerning the update of ETA codes, bail outs, and false indications of on scene, loading or circling, the Employer argues that these rules maintain an orderly dispatch system. However, the sanctions for violation of these rules not only includes fines, but also can cause the downgrade of a driver's level which can affect the assignments received.<sup>70</sup>

In its brief, the Employer contends that the afore-mentioned rules and regulations are enforced by the quality assurance committee. However, the evidence shows that the quality assurance committee members, who are essentially paid by the Employer for their work, simply look out for violations of the Employer's rules while they are on the road. While a committee member can stop and inspect a vehicle, there is no evidence that the dispatcher has abided by a committee member's instruction to cease dispatching work to a driver violating the rules. Rather, the evidence shows that the quality assurance committee members report a driver's infraction to the quality assurance coordinator who investigates the matter and determines whether penalties should be imposed.

The totality of factors as outlined above sufficiently persuades me to the conclusion that the drivers here are not independent contractors. Rather, it appears that the Employer maintains substantial control over the manner in which the drivers perform their assigned duties,<sup>71</sup> and retains a signifi-

<sup>69</sup>*Yellow Cab of Quincy*, supra at fn. 7, where the Board indicated that one of the factors in finding the drivers to be employees was the imposition of a dress code.

<sup>70</sup>*Metro Cars, Inc.*, supra, where the employer's disciplinary system involved three steps, warning, suspension, and termination for infractions of the rules of operation. If the drivers failed to abide by the uniform policy they could be subject to discipline.

<sup>71</sup>The Employer also relies on *Yellow Cab Co.*, 208 NLRB 1020 (1974), where a majority of franchisees hire others to operate the cabs: the franchisee hires the drivers even if the employer disapproves; the franchisees bargain individually with each new hire regarding wages and hours of employment; and, any complaints filed against the drivers are investigated by the employer but submitted to a board of franchisees who determine the fine. Thus, the Board found that the employer had no voice or control over wages, hours

*Continued*

cant financial stake in the drivers' earnings.<sup>72</sup> Accordingly, I find that the drivers are employees within the meaning of Section 2(3) of the Act.

As previously indicated, the parties stipulated that the approximately eight franchisees who employ drivers are Section 2(11) supervisors. The Petitioner contends that the drivers employed by the franchisees share a community of interest with the other drivers. I agree.<sup>73</sup>

The evidence shows that all drivers, even those employed by a franchisee, must be approved by the Employer. In fact, the evidence indicates that the Employer's franchise liaison essentially hires the drivers by approving their qualifications and grades them based on their level of experience. All drivers need the same licenses, permits, insurance, and registration, and the Employer retains copies thereof, as it does with all other drivers.<sup>74</sup> The Employer provides the same equipment, i.e., MDT and radio, to the franchisees' drivers as it does to all other drivers. The franchisee's drivers pay the weekly service fee to the Employer as do all other drivers. All drivers receive their assignments in the same manner, from the Employer's dispatch computer. Neither the dispatcher nor the computer has the ability to discern which drivers work for franchisees and which are franchisees themselves. While the franchise owners decide whether to allow the drivers to drop off the vouchers with the Employer or whether the owner should handle such matters, regardless of these arrangements, all drivers must use the Employer's vouchers. Although the franchise owner and driver decide between them whether they wish to be paid on a daily, weekly, or monthly basis, the Employer retains the same amounts from the vouchers of the franchisee's driver as it does with other drivers.<sup>75</sup> The franchisee's drivers are free to attend the Employer training class with all other drivers.<sup>76</sup> The disciplinary process is employed in the same manner for

or working conditions, which are established by the franchisees and that the franchisees hire and fire drivers without control by the employer. However, as detailed above, there is substantial evidence in this record indicating the Employer's control over the drivers.

<sup>72</sup>The Employer's reliance on *Ace Cab Co.*, 273 NLRB 1492 (1985), is misplaced. There, the Board found the individuals to be independent contractors because most of the employer's rules were dictated by city and insurance requirements. More importantly, the Board relied on the fact that the employer's only revenue derived from the fee for use of the emblem on the vehicle and permission to use the dispatch system. Thus, in contrast to the circumstances here, Ace's profits were unaffected by the drivers' efforts. Another case cited by the Employer, *Columbus Green Cabs*, 214 NLRB 751 (1974), is also inapposite because the drivers in that case remitted to the employer only that portion of their gross receipts that represented the lease fee; otherwise, the drivers retain all receipts above that fee. Further, the drivers do not report their locations or destination at any time and do not have to abide by a dress code. Accordingly, the foregoing cases represent factual situations considerably different from the facts here.

<sup>73</sup>Inasmuch as I find that all drivers share a community of interest I need not reach the joint employer issue raised by the Petitioner.

<sup>74</sup>Chaudhary testified that he did not know whether the franchise owner or driver pays for these documents.

<sup>75</sup>The evidence shows that the Employer has issued checks both to the driver and the franchise owner. The Employer checks with the franchise owner if the driver wishes to change the method of payment.

<sup>76</sup>Although Chaudhary testified that the practice is that the franchise owners train their drivers.

franchisee's drivers as with other drivers. Although there was testimony that fines can be assessed against both the franchise owner and driver and that the owner is responsible to collect the applicable fines, there is no record evidence that this has occurred. Rather, the Employer's quality assurance coordinator investigates complaints against all drivers and has the authority to impose disciplinary action, including fines and termination of the franchise contract. Although the Employer contends that the franchise owners have specific arrangements with their drivers, the Employer only singled out one such arrangement; the franchise owner decides the repair shop at which the vehicle is to be serviced. Although the Employer asserts that it notifies franchise owners if their drivers are unacceptable, Chaudhary could not recall any occasion when this occurred. Nor could he recall if a franchise owner fired his driver or if the Employer terminated a franchise owner's agreement based on a driver's behavior.<sup>77</sup>

A major determinant in an appropriate unit finding is the community of interest of the employees involved. The factors affecting the ultimate unit determination include the degree of functional integration, common supervision, the nature of employee skills and functions, interchangeability and contact among employees, work situs, general working conditions, and fringe benefits. In the instant case, it is clear that all drivers employ the same skills while performing the same work. Their general working conditions are similar in that they all receive assignments in the same manner, they use the same equipment, their pay is similar, they all are subject to the same rules and regulations, and they are all eligible to receive funds from the Employer's Sunshine fund and the death benefits fund. Despite that some drivers are supervised by the franchise owners, it appears that the Employer approves all drivers before they are hired. Moreover, when it comes to customer complaints and discipline, all drivers must answer to the Employer's quality assurance coordinator, who applies the same system to all drivers. Similarly, all drivers are subjected to checks by the quality assurance committee. Although the drivers hours may differ, this is because the drivers can choose when they wish to book in. Once they book in, however, the Employer's rules apply to all of them. While there may be little contact between drivers, this is because they are always on the road and they do not check in at the Employer's base with any regularity. In weighing all of the above factors, I find that all those who drive on the Employer's behalf constitute an appropriate unit. Accordingly, the following constitutes the appropriate unit within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers employed by the Employer at its 32-72 Gale Avenue, Long Island City, New York locations, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

<sup>77</sup>Although the franchise agreement requires that the franchise owners pay their for their driver's workman's compensation and unemployment insurance there was no evidence that this has been the practice.